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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 84. October Term, A. D., 1902.

JOSEPH H. BEALS, Plaintiff in Error,

vs.

JAMES J. CONE and LYMAN ROBISON,
Defendants in Error.

Error to the Supreme Court of the State of Colorado.

REPLY BRIEF OF DEFENDANTS IN ERROR.

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The argument of the plaintiff in error is a most elaborate document. It discusses the case in all aspects save that of jurisdiction. Every other issue of fact and of law, and every element of contention, including the honesty of jurors, the veracity of wit-

nesses and the integrity of trial judges, are embraced within a document of 249 pages.

If we believed that the case properly belonged here, and that the judgment of the Supreme Court of Colorado was the subject of review, we should ask your honors to follow Wilkes County vs. Coler, 180 U. S., 506, and decline to consider it; for the argument of counsel is filled with scandalous vituperation, aimed principally at a witness for the defendants in error, but embracing as well the jury and the trial judge. We will not quote from the brief, but refer the court to pages 158 to 238, inclusive. Every charge therein made has been rejected by the Supreme Court of the state, and every assertion of wrongdoing is unsupported by the evidence. When we consider that these matters are wholly of local concern, in no wise presenting questions cognizable by this court under the judiciary act, we are compelled to conclude that they have been intruded here from motives unworthy of counsel, and in derogation of the dignity of this tribunal. "Our records must be kept free from scandal," was the declaration in Wilkes County vs. Coler. Surely this salutary principle is wofully transgressed by the plaintiff in error, whose excuse must be anything but the claim that this court could consider a single error upon which his calumnies are based, even though the record presented some tangible ground of jurisdiction. We leave this matter without further comment for the court's consideration.

JURISDICTION.

A motion to dismiss the case for want of jurisdiction, together with a motion of the plaintiff in error for a writ of supersedeas, was submitted to this court on printed briefs, at the October term, 1901. The last was denied; the first was postponed to a hearing upon the merits. Counsel for the plaintiff in error has assumed the existence of federal questions in the record, and has, therefore, practically ignored the motion. We are so well convinced of its soundness, notwithstanding the apparent confidence of the plaintiff in error, that we shall, by way of reply, endeavor to demonstrate that there is nothing in the record for the court to review, and nothing in the plaintiff's argument which presents a federal question.

RES ADJUDICATA.

An attempt was made to plead a decision of the interior department canceling an entry and *rejecting a former application for patent* to the Ophir lode (the defendants' claim). To this a demurrer was sustained and no amendment of the plea was attempted. The decision was, nevertheless, offered in evidence in bar of our present application for patent, to which an objection was sustained. Counsel concede that this decision of the court, founded upon the fact that "as this is a second application for a patent, nothing that was adjudicated as to the first application has any

materiality to the case," would be good if we were relying upon a discovery made after October 11, 1892. Whether this contention be sound or unsound, is immaterial. In what respect does the decision of the court in the premises bring the case within section 709 of the Revised Statutes of the United States? Where does the record show that any such question was suggested by the court below?

The court properly held, first, that the plea of *res adjudicata* was obnoxious to demurrer, and that the secretary's decision was virtually one of non-suit to the attempted entry for patent, but in no wise vitiating our lode claim or affecting our rights on the pending application, to which this suit is directed.

Counsel evidently labors under the impression that the line of authorities holding that when a claim is founded upon the judgment of a federal court, the validity of which is rejected by a state court, a federal question is disclosed, is applicable here. But no right or location of the plaintiff is founded upon the alleged decision, nor has it any application whatever. The cancellation of our entry does not destroy our claim. If that were so, the result would be the same, whatever the basis of the department ruling might be. Failure to properly publish or post notices, to do the required amount of improvements, to make proper proof of citizenship, all or any of these, as well as want of discovery, would vitiate the location. This is absurd, as the decisions of the land department themselves declare.

Re Searl Placer, 11 L. D., 441.

Re Clipper Co., 22 L. D., 527.

Clipper Co. vs. Searl, 29 L. D., 137.

Clipper Co. vs. Eli Co. (Colo.), 68 Pac. Rep., 286.

The action of the interior department in canceling a previous entry of the Ophir claim left that claim in the same condition, just where it was before the application was made. Its owners might continue their possessory title, abandon the premises, or make a second application for patent. They chose to do the latter, and that application was not and could not be affected by anything which befell the former.

Nor is it true that we founded our second application upon a discovery previous to October 11, 1892. We were at liberty to prove a valid discovery at any time prior to our application that was prior to any valid discovery by the plaintiff, and that we did to the full satisfaction both of court and jury.

We have no quarrel with counsel's contention that the decisions of the secretary are in proper cases admissible in evidence, and that the state courts are bound by them. But, as pointed out by our Supreme Court, the cases establishing this doctrine are those which involve questions and titles over which the department of the interior *has full and exclusive jurisdiction*. All contests over titles to non-mineral public lands are before the departmental officers exclusively, and their decisions are final. But controversies concerning the right of possession to, and patents for, mines and mining claims must be fought in

the courts, and only when decided by them can the department act.

Owens vs. Stevens, 3 L. D., 699.

U. S. vs. Iron Silver Mining Co., 135 U. S., 286.

The decision in controversy dismisses an application for patent for certain reasons. Another application is made, and upon contest before a court having full jurisdiction it is decreed that our present right to patent is perfect. It is worthy of remark that the claim of federal question as to this feature of the case was, like the others, made only when plaintiff's petition for rehearing was denied.

Counsel is wholly in error in the assertion that "the entire testimony of defendants in error was directed to showing that there was a discovery in the Ophir shaft made in 1892." But if this were so, the fact can not affect the character of the error complained of, or transform it into a federal question.

ESTOPPEL IN PAIS.

The ingenuity of counsel is hardly equal to the establishment of this proposition as a ground of federal jurisdiction. We shall dismiss it with the reflection that it was justly held insufficient by the trial court, and that the plaintiff in error not only did not rely on Mr. Cone's statements before the register and receiver, but, on the contrary, his witnesses and coowners personally made careful examinations of the

Ophir shaft, and also knew of the notice posted by Mr. Cone near the shaft of the Tecumseh, warning all persons against the consequences of trespassing upon the Ophir claim.

Testimony of Bridge (Transcript, folios 51-3, 57-62). Testimony of Hoenshall (folios 64-6, 68-70). Testimony of Carr (folios 76, 80, 97-8, 100). Testimony of Lynch (folios 118-20, 135-138, 145). Testimony of Cone (folio 493).

The idea that a statement made under oath by a witness is not subject to subsequent explanation, is not sustained by the authorities. Cone testified that when testifying in the contest proceedings he understood the term vein to mean a formation containing mineral and within discernible walls. Indeed, under the authority of Hobbs vs. McLean, 117 U. S., 567, a party is not estopped by the testimony he may have given in a former case.

ORIGINAL CERTIFICATE OF LOCATION.

In what manner can the exclusion of the original certificate of location of the Tecumseh claim be construed into a federal question? These certificates are required by the state statute, quoted in plaintiff's brief. The original transcript (folio 45), signed by D. J. Bridge, J. H. Beals and Joseph Beals covers a different tract of ground from that embraced in the second (Transcript, folio 43), signed by Joseph H. Beals. It is founded upon a different discovery shaft and it is admitted by the plaintiff that there was no discovery of mineral whatever in the shaft of the orig-

inal location. The reasoning of the Supreme Court of Colorado upon the alleged error committed by its exclusion needs no amplification here, for this court has too often held an antecedent discovery to be essential to the validity of a lode location, while the making of a new and distinct location upon an independent discovery is an abandonment and in no sense a relocation of the previous one.

The fact that the trial court held that a subsequent discovery in the Ophir shaft could validate the Ophir claim, no intervening rights appearing, is in no wise material. The Ophir neither changed nor renewed its original location. Its vein is admitted to be in its discovery shaft and its claim is founded upon these conditions. This fact is conclusive upon the plaintiff, since by the verdict the jury found that we not only had a vein where it should be, but that its discovery preceded all alleged discoveries of the Tecumseh.

WHAT IS A VEIN?

If this term is not yet defined, and if the subtle distinction sought to be drawn by counsel between a vein and a crevice can serve to draw the cause within the circle of federal jurisdiction, then every mining controversy in the nation must ultimately find lodgment in the Supreme or the Circuit Courts. We think it may be confidently asserted that the courts have determined a vein, lode, ledge or crevice to be any deposit of metalliferous bearing rock in place in the general mass of the mountain. Stated differently, the terms apply to all forms of mineral deposit except

those known as placers, and they must be located, if at all, as lode claims under the federal statutes. Counsel's contention that under the laws of Colorado he may develop in his discovery working a crack filled with air and an occasional spot of mineral, and then find a vein somewhere else, would be ludicrous were it not so earnestly made. We shall not trespass upon the patience of the court by any extended criticism of this branch of plaintiff's argument. The day is passed when a judgment will be reversed because the trial court refuses to draw distinctions for the jury between lodes and veins or deposits and crevices. If they are told what a vein is or is not and what the evidence should disclose upon the subject, the requirements of federal and state law are equally satisfied and the judgment stands. In the case at bar the court's instructions upon this subject were unusually complete, and inasmuch as counsel can find no legal precedent for his remarkable contention as to the true meaning of the word "crevice" as the same appears in the state statute, while there are many against it, we pass along without further comment.

THE SOUTHWEST CORNER POST.

Again we ask, Where is the federal question? By our statute, passed in pursuance of and in harmony with the federal law, the locator of a mining claim is required *inter alia* to mark his claim with six substantial posts, hewed on the side in toward the claim and set one at each corner and one at the center of each side line. When in this marking

> "one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place."

The object of this staking is obviously to give notice by physical evidences of the exterior boundaries of a claim. It is merely an amplification of the federal requirement that

> "the location must be distinctly marked upon the ground, so that its boundaries can be readily traced." R. S. U. S., Sec. 2324.

The place for the southwest corner of the Tecumseh was somewhere in the neighborhood of a railway track. From the statements of the witnesses it was outside of the rails and away from interference with the passage of trains. Its establishment at the proper place may have been inconvenient, but it was certainly not impracticable. No pretense of a compliance with the statute was made, for the so-called witness stake actually set in the ground was a stone, which was not "suitably marked to designate the proper place." Testimony of Carr (folios 266, 278); testimony of McNutt (folios 269, 276). The requirements of this statute have been construed by the U. S. Circuit Court for the District of Colorado, Croesus Co. vs. Colorado Co., 19 Federal, 78, and by the Colorado Supreme Court in Taylor vs. Parenteau, 23 Colo.,

368, and in each instance its strict observance has been enforced.

In pressing this objection to the judgment, counsel says that no one knows upon what the verdict was based and for all that appears it may have rested solely on the "supposed invalidity of this southwest corner post." This being true, we may insist that were half a dozen federal questions really involved in the record, the case must have turned in fact upon an entirely different proposition.

PLACE OF DISCOVERY.

The plaintiff claims that

> "under and by virtue of the statute that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim, he was entitled, after showing a well defined crevice in the Tecumseh discovery shaft, to show and rely upon two other admitted discoveries in shafts other than the discovery shaft, but within the limits of the claim."

He then quotes the state statute concerning discovery shaft, and says:

> "To require this crevice as disclosed in the discovery shaft to contain a vein and then to exclude and disregard all discoveries of veins elsewhere, within the limits of the claim, is to give this state statute a construc-

> tion which brings it into conflict with the act of Congress. This is what the court below did, and thereupon a federal question is clearly presented."

This, then, is a proposition upon which plaintiff claims the court can take jurisdiction. It therefore demands full consideration, *although the transcript of the record will be searched in vain for any suggestion of its existence as a federal question in the court below.*

A rehearing was ordered by the Supreme Court on the plaintiff's petition, and further argument was invited upon the question whether a lode claim located prior to discovery could be validated by a discovery elsewhere than in the discovery shaft. Counsel for defendants availed themselves of the suggestion, and the lower court, after very full consideration, sustained its previous opinion as to the merits of the appeal.

> "It being conceded that the laws of this state relative to the requirements of a discovery shaft are valid, it appears to us that the proposition on which counsel rely is not tenable."

This concession can not now be avoided, because the exigencies of the case make it necessary to do so in order to secure a further review of the case elsewhere. It was good there and must be equally binding now.

We note, of course, the claim of counsel that he has been misquoted by the court; but we can not

reconcile his explanation with his complaint. He declares his insistence to be that the discovery shaft required by the statute should disclose a well defined crevice, that it should contain mineral in appreciable quantities "which can be weighed and assayed," and that this kind of mineral must be found in occasional spots in such crevice. Then a discovery elsewhere is good. This means, if it means anything, that if a mineral-bearing crevice is shown in a discovery shaft, a discovery of a vein elsewhere validates the claim. We respectfully suggest that, under such conditions, the last discovery is needless, for the claim is perfected by the first; and counsel's painfully constructed federal question disappears. That we may not be accused of misstating counsel's attitude, we quote from his brief, page 94:

> "We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that when the state statute in regard to such crevice *has not been literally complied with*, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which within the limits of the claim is required by the act of Congress."

Does not this state the plaintiff out of court?

In fact, plaintiff had nothing whatever in his discovery shaft save a crack, or series of cracks, with nothing whatever in them. The defendants' assayers, Doyle and Burdette, selected 182 samples for assay from the shaft, taking them vertically and transversely a foot apart throughout its depth and breadth.

(Transcript, folios 425-430, 454-6.) None went more than a trace. The jury accepted this evidence as true. Hence even the claim of mineral "in spots" is not applicable to the hole we are considering, for it was innocent of the bare suggestion of gold.

The theory that this statutory requirement is opposed to the act of Congress is virtually presented here in this case for the first time. Counsel for plaintiff in error is almost the originator of the proposition that a discovery of a vein outside the shaft is unavailing, and though unsuccessful in the particular instance, has clung to it with all the energy of his persistent nature. In fact, there is nothing inconsistent with the federal law in this requirement. It appears in the miners' rules and regulations of mining districts, from 1861 down to the enactment of the federal statute of 1872. We refer to United States Mining Laws, page 509 et seq., and particularly to the rules therein recited from the Argentine, Devils Gate, Chinatown, Bay State, Gold Hill, Downeyville, Illinois, Chicago Creek, Gregory Union, Griffith, Virginia, Russell, Montana, Washoe, Ward, Empire, Canon, Sugar Loaf, Wisconsin, Grass Valley, Independent, Gold Lake, Banner, Grand Island, Lincoln, South Boulder, Coral, Snake River, Clear Creek, Granite, Central and Taylor Park mining districts. In many of these the term "crevice" as the synonym of vein, and "crevice matter" as the synonym of vein matter are frequently used.

In the Gregory mining district of Gilpin county, in a rule adopted May 29, 1861, it was expressly provided that a hole or shaft should be sunk upon the lode located. It will be seen that in Boulder, Gilpin and

Clear Creek counties this idea was especially prevalent, and when we turn to the territorial laws of the state, which were undoubtedly framed largely by members from these counties, we find it crystallized in the shape of a statute. The first mining act was approved November 7, 1861, and while it said nothing about discovery or discovery workings, it provided only for the location of lodes or crevices. In 1866, but before Congress had enacted its first mining statute, an act was passed to provide a better code for the mining regions, the first two sections of which were as follows:

> "Section 1. That hereafter each and every person who shall discover any mineral lode or vein of gold-bearing ore, or of silver or other valuable metals in this territory, shall, by virtue of such discovery, be entitled to take, hold and possess fourteen hundred (1,400) feet, lineal measure, of such lode or vein, of which the discovery shaft shall be the center thereof; and said fourteen hundred (1,400) feet, so taken, shall be known and described as the discovery claim.
>
> "Sec. 2. All lodes or veins of gold, silver, or other valuable minerals, which may hereafter be discovered, shall be marked at the point of discovery by a substantial stake, post, or stone monument, having inscribed thereon the name of the discoverer or discoverers, and the name of the lode or vein, with date of discovery; and the discoverer or discoverers shall, before recording, excavate thereon a shaft at least ten feet deep, or

deeper, if necessary, to find a well-defined crevice, or forfeit all right and title he or they may have acquired by virtue of such discovery."

The court will see how crystallized by this time had become the idea of discovery, discovery claim and discovery shaft. The court will also see that, in the opinion of the legislature, the term discovery and discovery shaft were practically identical. The discovery shaft at this time was made the center of the claim 1,400 feet in length, which was called the discovery claim, and by the second section, a failure to sink a discovery shaft to a depth of ten feet entailed a forfeiture of all right or title acquired by virtue of a discovery. From this time time until 1874 the mining law remained practically unchanged, except as to certain statutes regulating the total length of claims, and making a provision concerning school and other claims, but in 1874 an act was passed which has remained practically unchanged down to the present time. Section 5 of that act is as follows:

"Before filing such location certificate, the discoverer shall locate his claim by first sinking a discovery shaft upon the lode to the depth of at least ten (10) feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice. Second, by posting at the point of discovery on the surface, a plain sign or notice containing the name of the lode, the name of the locator, and the date of

discovery. Third, by marking the surface boundaries of the claim."

This language may be considered as the crystallization of the miners' rules and regulations and previous territorial acts relative to the valid location of a mining claim. It should be read, however, in connection with section 7, which is as follows:

> "Sec. 7. Any open cut, cross-cut, or tunnel, which shall cut a lode at the depth of ten (10) feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten (10) feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

Any reading or analysis of these two sections will beyond any question convince the court that the lode or ledge located must be shown in the discovery working, and that the discovery shaft is intended to be the equivalent of a discovery mentioned in the federal statute. In 1866 the legislature said that if the discovery shaft was not sunk, the claim should be void. In 1874, as an arbitrary requirement, it was enacted that before the location certificate should be filed the discoverer should locate his claim by sinking his discovery shaft, and by posting at the point of discovery his plain sign or notice, and third, by marking the surface boundaries of his claim. Where, for instance, should the location notice be posted? What is the point of discovery of a lode mining claim? Could it be said

under this section that a locator could place a sign or notice at the point of discovery at one end of his claim, and sink his discovery shaft at the other? Would it be a discovery shaft if sunk at another point than where his discovery notice was placed, and by the term, "point of discovery," is anything meant except discovery or disclosure of a lode or mineral deposit? While the actual point of discovery need not be selected as the point to plant the notice announcing to the world that a lode had been found and was being claimed, it is certain that the place selected is to be called the discovery, and a discovery must show the lode or mineral, and it is further evident that the legislature intended that the word "discover" mean that the discovery stake and discovery shaft must be located at the same point. This is made clear by the provisions of sections 7 and 8, where it is said that a cross-cut or tunnel or adit at least ten feet in along the lode from the point where the lode may *in any manner be discovered shall be equivalent to a discovery shaft*. In this section the word "discovery" and discovery shaft are clearly synonymous, it being plainly stated that the discovery work must be done at the point where the lode is discovered. We contend then that it is clearly demonstrated by the miners' rules and regulations and by all statutory enactments, territorial and state, that it was always intended that the discovery shaft should show the discovery of a lode; and while, of course, the locator would have a right to select his point of discovery at any place he chose, after having disclosed a lode, that when selected it should be considered his discovery, and whatever working he made at that point should be his discov-

ery working. We do not think that a discovery working ten feet in depth at the place where the discovery stake was located would hold a claim if another shaft fifty feet deep were sunk 1,000 feet away and disclosed a vein. There would be nothing to warn the second prospector that the claim was located in good faith with the idea of its being permanently held. The location stake and notice, together with the work disclosed at the point where it is placed, would be a notice which the second prospector would be required to observe, and if he failed to find at that point all that the statute required, and saw by the notice that the time for the sinking of a discovery shaft had long since expired, he would be perfectly justified in relocating the lode.

This view is strengthened if we come to consider the relation of the discovery and the discovery shaft to the entire claim. The fundamental theory of the mining law is the location of a single lode with a certain amount of surface ground upon each side of it. Whether this ought to be the law or not is beyond the present discussion. It is the law, and it only gives one such additional veins as may be found within the limits of the exterior boundaries of the claim by reason of the location of one main vein or lode. Let us say, for instance, that A goes upon the public domain and locates a mining claim, which we will call the B lode mining claim. He puts up his discovery stake at the southerly end of the claim ten feet from his south end line, sinks a shaft ten feet in the wash, and marks the boundaries of his claim. No one will contend that this will give him a valid title to this tract of ground 1,500 feet in length by 300 feet in

width. Some six or eight months afterward he finds upon the north end of his claim, and ten feet away from the north end line of a vein of mineral running across his claim, and sinks a shaft upon it fifteen or twenty feet in depth, clearly demonstrating its existence, but he does not post any notice of discovery, makes out no new location certificate claiming this vein, and leaves his original discovery shaft, his original notice of location, at the southerly end of his claim, 1,480 feet away. Could it be said under any rule of law, or under any theory that his location would be good as against C, who, locating east or west from him surveyed across the B claim? Under the rule in Patterson vs. Hitchcock, which has never been doubted in any tribunal, his right to the vein located terminates where that vein leaves his located ground. If he has no located vein, his rights must terminate at his original discovery shaft. Or, again, suppose that A locates a claim upon a vein, which, when located, he supposed ran north and south, but which, as a matter of fact runs east and west, but he lays out his claim north and south, sinks his discovery shaft upon this vein, posts his location notice claiming 1,490 feet running north from his discovery shaft and ten feet running south. It afterwards develops that his vein runs almost due east and west, and across his claim, but that at the northerly end, ten feet from his north end line is another vein running east and west across his claim. Upon this vein he does a large amount of work, but posts no new notice, and makes no new location. Could he hold this other vein under the B location? Would he not, under the theory and under the terms of the law as announced in Patterson vs.

Hitchcock, lose all right to his location 150 feet north of the vein shown in his discovery shaft? In other words, the location must be made upon the vein, lode or ledge discovered, and all of the rights growing out of the location are measured by this vein. This is the law as written in the statute book, and as announced in many decisions.

Gleeson vs. Martin White M. Co., 13 Nev., 442.

Gwillim vs. Donnellan, 115 U. S., 45.

Armstrong vs. Lower, 6 Colo., 393.

How then can it be said that a discovery shaft sunk upon another vein, or upon another deposit of mineral, can validate a location made upon no vein and showing no mineral in the discovery shaft at the point where the discovery notice is placed?

It may not be necessary for a discovery shaft to be in the center of the claim, because a reading of the state and federal law demonstrates that the width of the claim is to be measured from the vein itself. Thus section 2320, Revised Statutes, says that mining claims shall not exceed three hundred feet on each side of the middle of the vein at the surface, and Sec. 3149 of Mills' Ann. Stat. of Colorado says that the width of lode claims shall be 75 or 150 feet, as the case may be, on each side of the center of the vein or crevice. The discovery shaft or a discovery of a lode is frequently made upon the dip of the vein, and it may well be that the discovery shaft can remain at this point, and the notice of discovery can also remain there, while the width would depend upon the middle of the vein at the surface, or from the center of the crevice.

But it is expressly provided by section 3151, which is section 4 of the act of 1874, that the discovery shaft must be sunk at least ten feet or deeper, if necessary, to show a well defined crevice, and upon the lode discovered.

The principles of Patterson vs. Hitchcock have been affirmed by this court in Bushnell vs. Crooke Mining and Smelting Co., 12 Colo., 247. The instructions approved in case were that where a party has located a lode and is met by an adverse claim covering a portion of the surface boundaries of his location, that if the lode disclosed in the adversing claim was more than 150 feet distant from the apex of the original lode located, the locator could not claim it. In other words, it was the lode itself, and 150 feet upon each side of it as located, and if the lode did not run through the center of the claim, or ran in such a way as to depart 150 feet from a side line other lodes within the side lines could not be held by the location.

Turning to decisions bearing directly upon the question of discovery we find them all one way. Those which are claimed to be in favor of no mineral in the discovery shaft will be found upon close examination to hold the contrary.

Mr. Lindley and Mr. Morrison give three cases as holding a contrary view.

Chambers vs. Harrington, 3 Utah, 94.

Wight vs. Tabor, 2 L. D., 738.

North Noonday Co. vs. Orient Co., 1 Fed. Rep., 522.

But an examination of all three cases discloses the fact that not one of them uses any language which can

be construed against our position. Perhaps the one nearest to holding the contrary view is the decision in Wight vs. Tabor, 2 L. D., 738. In that case the owners of the Maid of Erin claim applied to the government of the United States for a patent. The owners of an adjoining claim, called the Vanderbilt, failed to file an adverse against the application, but protested in the land office. The evidence did not satisfactorily show that the discovery shaft of the Maid of Erin contained a defined body of ore, and was conflicting upon this point, but in another shaft, called the working shaft, a well-defined body of ore had been found. Secretary Teller simply held that as between the applicant and the government, when no question of adverse rights was in issue, *because no adverse claim had been filed*, he would not inquire too closely into the fact whether or not there was mineral in the discovery shaft. It is true he said something about the validity of the Colorado statute requiring the discovery shaft to be sunk to a depth of ten feet, and recognizing that the statute itself expressly required that the shaft should be upon a mineral bearing vein, and questioned the authority of the legislature to make such a requirement, but for all purposes so far as that particular case is concerned, he refused to pass upon the question of whether there was mineral in the discovery shaft or not, and ordered the government patent to issue.

Wight vs. Tabor, 2 L. D., 738.

The next case is Harrington vs. Chambers, decided by the Supreme Court of Utah, and was taken upon another point to the Supreme Court of the United States. In that case the evidence

showed that there was ore or a vein disclosed at the discovery, which in Utah is equivalent to a discovery shaft, and evidence was also received to the effect that vein matter was found at other points in the claim. An objection was made to this latter evidence, and this was passed on in the decision. The Supreme Court of Utah in reality but confirmed our position. What was said is as follows:

> "Objection is made that 'testimony was received tending to show that there were indications of ore or vein matter at other points on the surface of the Parley's Park claim than at what was called the discovery.' A sufficient answer to this objection is found in the statement of the referee, that he would receive the testimony 'for the purpose of showing a continuity of the vein testified to at the discovery point.' Without this limitation upon the effect which the court declared he should give to the testimony, it was proper and admissible. The ore or the indications which determine the prospector to make the locations are seldom confined to one spot. Neither is there any requirement of the law, which compels him to name as the discovery point the precise spot where he first finds ore, or the indications, which to his mind form the lead or lode. In fact, before the location is made, an examination or tracing is often required to determine its course, and in doing this the cropping may be found in numerous places. Which will

finally be marked a discovery may depend upon considerations of convenience for work, description, monuments, etc. It was competent for the plaintiffs to show that ore or mineraized rock or whatever the 'miner could follow and find ore' *was not only marked discovery, but cropped out at other points within the 'limit of the claim located,'* and thus strengthen the testimony already in, in reference to the indications at the point called discovery."

Harrington vs. Chambers, 3 Utah, 94 (1 Pac. Rep., 362).

The case was taken to the Supreme Court of the United States, where the judgment of the Utah Court was affirmed, but this particular point was not touched upon.

Chambers vs. Harrington, 111 U. S., 350.

The other case which is cited is North Noonday Company vs. The Orient Company, 1 Fed. Rep., 522, a case arising in California, where no statute exists as to any particular depth for the discovery shaft. The reported case consists of Judge Sawyer's charge to the jury. An examination of it does not disclose anywhere a discussion of this point.

When we come, on the other hand, to look at the cases bearing upon the question asked by the court, and where the matter has been at all brought to the attention of the courts, we find that all of the decisions are unanimous upon the point that ore must be

found in the discovery shaft. The earliest case, perhaps, is that of Van Zandt vs. Argentine Mining Company, which was tried in 1881, in Leadville. Judge Hallett charged the jury in that case specifically that it was necessary to have ore in the discovery shaft. We quote from that decision the following:

> "The position of the plaintiff is, that Walls and Powell, the locators of the Adelaide claim, found a lode or vein in the discovery shaft sunk by them, and that position is controverted by defendant. I do not recall anything said by witnesses as to a crevice in the shaft; but there is some testimony to the effect that ore bearing silver was found there. If you find from the evidence that such ore was taken from the Adelaide discovery shaft, it is important to consider whether it existed in mass and position; or, in other words, in the form of a vein or lode; or, on the other hand, in a broken and fragmentary condition, intermingled with the slide and debris on the surface of the mountain. For it rests with the plaintiff to show that ore was found in the discovery shaft, and also that the same body, vein, or lode extends to the ground in controversy. Of course, if ore was found in the discovery shaft, and the ore so found was broken and fragmentary, it can not be said that a body of ore—a vein or lode—was found in that shaft, which extends to the ground in dispute. So that, if you find that no ore was

found in that shaft, and it was broken and fragmentary, your verdict will be for the defendant. And in this view—that is, assuming the facts to be as stated—the circumstance that plaintiff's grantor afterwards developed the body of ore in controversy higher up the mountain side, will not affect the result. For a location rests on what may be found in the discovery shaft; and if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail. But if a vein or lode was found in the discovery shaft of the Adelaide claim, and it extends throughout the ground in controversy, the plaintiff may prevail."

Van Zandt, Trustee, vs. The Argentine Mining Co., 8 Fed. Rep., 725.

That case was taken to the Supreme Court of the United States, and there affirmed.

Argentine Co. vs. Terrible Company, 122 U. S., 478.

While the opinion of the court does not expressly say, as Judge Hallett did, that the validity of the claim depends upon ore in the discovery shaft, yet it affirms the instructions given by the court below. The case of Gwillim vs. Donnellan, decided by the Supreme Court of the United States a short time prior to the Adelaide case, involved only this identical

point, and held that the loss of the discovery shaft meant the loss of the claim.

Gwillim vs. Donnellan, 115 U. S., 45.

This case recognizes the fact that under the Colorado statute the discovery shaft is the vital spot in the claim, which must perish when the shaft is lost.

Under our statute the recorded certificate must recite the number of feet in length of the claim on each side the center of the discovery shaft. If the latter can be shifted from place to place for the accommodation of later discoveries, what man can depend upon the character or extent of a location when, after examining a discovery shaft, he finds it destitute of mineral, with nothing to warn him that somewhere else within its boundaries the real discovery may be found?

Another case arising in Montana, and finally reaching the Supreme Court of the United States, is of the utmost importance. It is the case of Upton vs. Larkin. There the controversy was as to the existence of ore in the discovery shaft of a claim called the Comanche, and whether or not that shaft was within the limits of a prior patented claim. The Supreme Court of Montana decided that there must be ore in that particular shaft and that no subsequent discovery within the limits of the claim would validate it, and that the shaft must be upon the public domain. The Van Zandt case was cited in support of these positions. We quote from the first decision the following:

> "The question is whether such a location becomes valid by the subsequent discov-

ery of a vein or lode within the limits of the claim located? A discovery within the boundaries of the Shannon claim would not authorize or support the location of the Comanche claim outside of such boundaries. The discovery must be within the limits of the claim located, and must have been made on the public mineral lands. A location without a discovery does not carry with it a grant from the government to the exclusive possession and enjoyment of the ground located, nor does such a grant attach or belong to a discovery alone. The right to so possess portions of the public mineral lands, as that the right to purchase attaches thereto, comes alone from a discovery and location in pursuance of the law. If a discovery is made the right of location follows."

Upton vs. Larkin, 6 Pac. Rep., 66.

The case was reversed at that time and went back for another trial, and upon the second trial these views were reaffirmed and the case was then taken to the Supreme Court of the United States, and there the decision of the Montana court was affirmed.

Upton vs. Larkin, 17 Pac. Rep., 728.
Larkin vs. Upton, 144 U. S., 19.

We quote from Judge Brewer's opinion the following:

"It is unquestioned law that the top or apex of a vein must be within the boundaries

of the claim in order to enable the locator to perfect his location and obtain title. Turning to the findings, these three are all that are pertinent to this question—two in response to interrogatories submitted by the plaintiffs, and the other to one submitted by the defendants:

"First. Did the locators of the Comanche lode claim, prior to the location of said claim, discover in the shaft claimed by them as the discovery shaft a vein or crevice of quartz or ore, with at least one well-defined wall on a lode or vein of rock in place bearing gold, silver or other valuable mineral deposits?

"Answer. Yes.

"Second. If your answer to the foregoing interrogatory be 'yes,' then answer: Was any part of such vein or lode discovered by the locators of said Comanche claim at the point of discovery, south of the south boundary line of the Shannon lode claim as patented and within the limits of the said Comanche lode claim as located?

"Answer. Yes.

"First. If the jury find that the locators of the Comanche lode claim discovered a vein in the lode or shaft claimed as the Comanche discovery, then the jury will answer: Was the top or apex of such vein within the limits of the Shannon claim as patented?

"Answer. No.

"We fail to see any conflict between these findings and the general verdict. They

show that within the discovery shaft a vein was disclosed, and that the top or apex of such vein was not within the limits of the Shannon claim. It follows, of course, that it must have been within the Comanche claim, and that was sufficient to sustain the location."

Larkin vs. Upton, 144 U. S., 19.

We also call the court's attention to Cheesman vs. Shreeve, 40 Fed. Rep., 787; Book vs. Justice Mining Company, 58 Fed. Rep., 106.

It sems to us that the decisions of this court, however, are conclusive upon this point. In the case of Bryan vs. McCaig, 10 Colo., 309, the court reversed the case because the instructions did not state squarely the kind and nature of a crevice that must be disclosed in the discovery shaft. In support of its position this court cited Van Zandt vs. Argentine Company. We quote from that case the following:

"That portion of the instruction treating of the record of the claim is too indefinite to mean anything, except that some kind of a record is required. What must be recorded, and when the record must be made, and where, are questions upon which the jury should have been instructed; but upon these questions the jury is left to determine the law as well as the fact. The jury are also instructed that the plaintiffs must prove 'that the Apex lode was located by sinking a shaft at least ten feet from the lowest part of the

rim at the surface, showing a well-defined crevice.' This part of the instruction, which states the law correctly, so far as it goes, is incomplete in not stating what the crevice must contain. Under the instructions as given, the crevice shown by sinking the shaft might be absolutely barren of mineral of any kind, and yet the plaintiffs would have complied with the law as given to the jury; but such compliance would not confer any right upon plaintiffs to the possession of the premises, without the further showing that such crevice contained mineral-bearing rock in place."

Bryan vs. McCaig, 10 Colo., 309.

And the same thing is practically reaffirmed in Omar vs. Soper, 11 Colo., 380, and decided in Girard vs. Carson, 22 Colo., 345. In the latter case the court goes so far as to hold that the loss of the discovery shaft means the loss of the claim. How this could follow, if there was another shaft upon the claim disclosing a mineral-bearing vein, we are at a loss to understand. No one will dispute that if the party abandons his original discovery shaft and adopts another shaft, makes it the central feature of his location, posts his notice at that point and describes it in his location certificate as his discovery shaft, that he would have a perfect right to do it, and that his new shaft would validate his claim from the time of his new location. But that is an entirely different proposition from saying that the prospector can attempt to hold on to an old discovery shaft which shows no mineral

and validate his claim by simply finding ore in another shaft without adopting the new shaft as his discovery. This is the law as laid down in Girard vs. Carson, where the instruction which was complained of and sanctioned by this court was as follows:

> "The jury are instructed that if you believe from the evidence that the original discovery shaft of the Long John lode was sunk on unappropriated ground, and that afterwards the plaintiffs permitted it to be taken away from them and patented as a part of the North Star lode mining claim, the plaintiffs can not recover in this suit unless they made another location on unappropriated ground by setting up a new discovery stake at the new discovery shaft and otherwise complied with the requirements of the law as indicated in instruction 1, with regard to the location of a mining claim."

The following cases decided by this court also confirm this general proposition.

Wolfley vs. Lebanon Company, 4 Colo., 112.

Gray vs. Truby, 6 Colo., 278.

Electro Magnetic Co. vs. Van Auken, 9 Colo., 204.

Pelican & Dives Co. vs. Snodgrass, 9 Colo., 339.

All of the text-writers who have written upon mining law sustain this conclusion.

Morrison's Mining Rights, 27.

Lindley on Mines, Sec. 345.

Barringer and Adams on Mines, 214.

In fact, we can not conceive how it can be claimed or held that any other view of our statute is correct. The express language is that the discovery shaft must be sunk ten feet upon the lode, or deeper if necessary to show a well-defined crevice. The notice of location must be posted at that point. It is the working which must disclose the lode which is located. In the location of fissure veins it is impossible to conceive of the idea of a discovery shaft not disclosing the vein without destroying all of the intent and meaning of the mining law. In a mining camp like Leadville, where the underlying mineral strata are found in the nature of large blanket veins, and claims are located so as to acquire title to a segment of this vein, the whole theory and intent of the mining law have to be done away with in order to justify locations at all. Under the conditions there found, and under similar conditions if they should be found elsewhere, it is of course possible to see how a theory can be maintained which would sustain a discovery of mineral at another point in the claim, but even then such a theory would result in such a modification of the mining law that we do not believe it ought to prevail, and it would have to so far disregard a plain reading of the statute that we do not believe it ought to be sustained even to do justice in a particular case.

In the case at bar, however, the evidence shows that if the mineral was found in the other shafts upon the Tecumseh claim, it was found at a time when the owners of the Ophir had a receiver's receipt from the government of the United States. In other words, at the time when the Ophir claim was withdrawn from the public domain. The fact that this receipt was afterwards cancelled we do not think would permit any one to enter within the limits of the claim while it was in full force and effect and make an adverse location. In the decision of this court in Omar vs. Soper, supra, it was held that even an invalid location would prevent other locators from an act of trespass in going within its limits and making a new location. While here the Ophir was a subsisting location, and had gone to receiver's receipt, the government of the United States had received the money in payment for it, and held the mere naked title in trust for its owners, and during that time the owners of the Tecumseh, mining within its limits, claimed to have discovered bodies of ore not disclosed in their discovery shaft, and by this means to validate a previously invalid location. Under the doctrine of Omar vs. Soper, and all of the decisions in the mining states, this could not be done. We submit that upon this point the theory of this court in its opinion is as favorable for the plaintiff in error as they could possibly ask, and the court is not only justified in adhering to its original opinion, but in going further and saying that the discovery of mineral outside of the limits of a discovery shaft without adopting such new discovery of mineral as a discovery shaft, will not validate previously invalid locations.

The fact that the commissioner of the general land office decided the protest of the Tecumseh owners against the Ophir and ordered the cancellation of the receiver's receipt prior to or about the time of the second and only location of the Tecumseh, is immaterial in view of the additional fact that an appeal was formally taken to the secretary. This appeal was not disposed of until late in 1895. Even then a petition for rehearing under the rules was interposed, so that the actual cancellation of the receiver's receipt was not ordered and did not occur until 1896, a period of two years after the Tecumseh people sunk what they called their discovery shaft within the boundaries of the Ophir claim. That such a location can prevail in any event unless followed by a relocation subsequent to the cancellation of the receiver's receipt is impossible, unless we are to disregard the decisions and the analogies furnished by the law in other cases. The department and the courts as well have decided that the rejection and cancellation of an entry does not destroy the location, which may not as a location be affected by such action. If this is true, *a fortiori* is a mining claim segregated from the public domain, the receiver's receipt for which is extant and uncancelled. When cancelled it would not relate back to and take effect as of the original finding of the lower tribunal. If that were so rights might be initiated at such time only to cause infinite trouble in the event the order of cancellation should be subsequently overruled. Let us suppose as an illustration that between the decision of the commissioner ordering the entry cancelled and its ultimate affirmance on appeal the plaintiff in error in this case has brought suit in ejectment; would not

our defense of title based on the receiver's receipt and its offer in evidence be conclusive of the suit? Or suppose some third person to have made a similar location, and ejectment had followed either for or against him; would not the receiver's receipt up to the time of its cancellation have been conclusive of the possessory rights of the defendants in error? If this be true, it certainly must follow that the inception of the Tecumseh title is incurably bad and consequently the exposure of a vein, whether in its discovery shaft or some other shaft, would not avail in the absence of a subsequent location.

The federal law enacts the forfeiture of a mining claim upon failure of the owner to expend $100 upon it every year. Conflicting locations depending for their validity upon priority of discovery have frequently been in court, and one of them has reverted to the public domain through failure to comply with this statutory provision. We need not cite the unbroken line of decisions which have established the law that in such a case the other location can not avail itself of that circumstance without a relocation as the consequence of it. The cancellation of a receiver's receipt is no more effectual in restoring a claim to the public domain than is its abandonment by failure to comply with the legal requirements. Hence, we say that the alleged effect of a discovery after location in some other part of the Tecumseh claim is of secondary importance and can not determine the rights of the parties here.

Another conclusive reason exists for this assertion. It is not denied that the Ophir discovery shaft was twenty-five feet deep when the receiver's receipt

was issued, and when the hearing was had upon the protest in October, 1893. At that time the Tecumseh had not been located. A paper claim existed upon a confessedly barren shaft, the boundaries of which in no wise conform to those of the claim in controversy here. That claim was not located, nor was any discovery shaft or other shaft sunk upon it, until the summer of 1894. It was not until 1895 that the other openings were made in which the discovery of veins is asserted. Now the testimony of the defendants in error, which the jury believed, is that at a point twenty-two feet from the surface, a vein of gold-bearing ore in rock in place appears on the eastern side of the shaft and may be traced from that point downward throughout the shaft for some forty feet. It is admittedly there at a lower depth, but if it be true (and it is conclusively determined by the jury to be true) that the Ophir vein appears at a distance of twenty-two feet from the surface on the eastern side of the shaft, then it follows that *the Ophir vein was discovered long before the present Tecumseh claim was thought of;* and that discovery makes it good as against all veins opened by the Tecumseh people, whether in their discovery shaft, in the other shafts, two, three and four, or any or all of them. In other words, we claim by virtue of discovery prior to the pretended location of the Tecumseh, and all the argument of the plaintiff in error to the effect of a discovery in some other part of his claim is entirely speculative. Hence, with all due respect to the suggestion of the court that this question be argued, we are unable to perceive its importance, or in what manner it can affect the rights of the plaintiff in error. Of course, we know that plain-

tiff in error assumes as a premise to his argument that no discovery was made by the Ophir until the year 1895, subsequent to the sinking of his shafts one, two and three. Unfortunately, the jury has disagreed with him, and as the testimony supports the verdict we are to assume that this fact is *stare decisis.*

An instruction bearing upon this point, even if erroneous, which we do not admit, would constitute error without prejudice; for, if it be true that our discovery precedes all the others, it must follow that, even if the jury were instructed that a subsequent discovery in some other part of the claim was equivalent to uncovering the vein in the discovery shaft, both court and jury would be compelled, nevertheless, to give the property in dispute to the defendants in error.

We may add, however, that the integrity of our argument as to the necessity of a vein in the discovery shaft is well illustrated in the case at bar. It appears in the record, although not in the printed abstract, that testimony was offered showing that the crack constituting the so-called vein in the discovery shaft had a strike of northwest and southeast, which would throw it across the Tecumseh westerly side line at a point more than 150 feet distant from the Ophir discovery. Patterson vs. Hitchcock, and cases based thereon, declare that the Tecumseh location is void as to that part thereof which lies more than 150 feet from the center of said alleged vein. Now, if this be true, the alleged junior discovery of the Ophir was upon public domain, as against the Tecumseh, and so were the subsequent shafts on the Tecumseh itself. If, under these circumstances, a subsequent discovery in some other part of the claim can cure the fatal

defect resulting from the original location, it is difficult to perceive why the statute requires a specific discovery shaft at all.

It must also be remembered that the plaintiff in error has never wavered in his assertion that there was a vein in his discovery shaft. Whatever the defendants in error prove may have been done, we contend the plaintiff in error is estopped by his own position. The doctrine that a subsequent location elsewhere cures the first location is necessarily based upon the assumption that the original discovery shaft is barren. If it is not, there is no foundation for the doctrine based upon subsequent discovery. If it is, the claim is void *ab initio*, and validity can not well be imparted to anything absolutely dead. The plaintiff in error is welcome to either horn of his dilemma. Neither of them can affect the defendants in error, and the judgment of affirmance heretofore rendered should not be disturbed.

The case of North Noonday Co. vs. Orient Mining Co., 1 Fed., 522, and kindred decisions, are not apposite. They arose in states whose statutory provisions differ from those of Colorado and were founded upon different facts. This is noted by Mr. Lindley, section 345 of his work on Mines. He says:

> "Neither the laws of Utah nor California require the performance of development work as a prerequisite to a perfected location, and in the absence of such local legislation it is not required."

See also section 346.

In Wight vs. Tabor, counsel for plaintiff in error here vigorously contended for the position we are defending, and, while Secretary Teller decided that the discovery of a vein elsewhere than in the discovery shaft was sufficient, it must be remembered that the Maid of Erin claim had been entered and was attacked by protest. Had Wight filed his adverse and brought suit before entry, thus presenting the question directly to the determination of the courts, he would have prevailed. It must be remembered also that this court, in Gwillim vs. Donnellan, has since recognized the doctrine and enforced it.

The case cited from 57 Pac., 11, Mining Co. vs. Lowry, determines merely that a subsequent discovery on a senior location outside its conflict with a junior patented location, which includes the original discovery shaft of the senior claim, preserves the residue of the claim to the owners thereof. It will, of course, be observed that in this instance there was an original discovery, and consequently an original valid claim. The case would be in point if the Tecumseh had ever discovered or enclosed a vein in its shaft and had then lost or sold the shaft, but had also discovered a vein and sunk a shaft thereon in the remainder of the claim. In the case at bar, however, the jury declared that the plaintiff never uncovered a vein or crevice in his discovery shaft, the only place where other prospectors looking for vacant grounds are required to examine therefor; and hence its shafts hundreds of feet away were of no consequence. Counsel seem to entirely lose sight of our contention, confirmed by our judgment, that *the plaintiff never had a vein or anything that could be called a vein in his discovery shaft.* Hence

the apparent confusion in which cases like that from Utah seems to have involved him.

If counsel believes that the state statute, when construed differently from his interpretation of it, involves a conflict with the rights given his clients by section 2324, R. S. U. S., he should have raised the question squarely in the Supreme Court on appeal and before rehearing. It was not done at all, and hence we can not consider it now, even though the contention were natural or could be maintained.

ANNUAL LABOR.

There is no dispute between us as to the statutory requirement of annual labor and expenditures upon unpatented mining claims. Counsel's contention is that because the jury credited our witnesses and rejected his as to the work and expenditures for 1897, a federal question was involved both below and here. The work was done, the money paid and the statute fully complied with. This was the effect of our testimony, and the jury accepted it as conclusive.

The instructions of the court concerning this question were against the defendants, and they were erroneous; for we were not obliged to prove any annual work for 1897, and no forfeiture would have resulted from our failure to do so. The error being in favor of the plaintiff, he can not complain, even though its commission involved a federal question, which is not the case.

We shall not burden this brief by a review of the facts. Suffice it to say that the testimony for and

against the proposition was conflicting, and, like all other disputed facts, was determined by the jury. As to the law, the statute merely provides that "upon a failure to comply with its conditions the claim or mine—*shall be open to relocation* in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns or legal representatives *have not resumed work* upon the claim after failure and before such location."

Revised Statutes United States, 2324.

The suit was commenced June 25, 1896. Its issues were completed by filing of replication, on August 12, 1896. *What was done on the claim for the succeeding year was therefore immaterial.* We offered evidence of annual labor for 1897 merely as showing our *bona fides* as to possession. The plaintiff attacked our testimony, and then induced the court to instruct the jury that unless we had done the required work for that year we could not recover as against the United States; an instruction which would have reversed the judgment if it had been against us. For apart from the fact that the testimony related to a time subsequent to the making of the issues, and that no supplemental pleading tendering it as an issue had been offered, the neglect to perform the labor does not work a forfeiture of the claim.

Lakin vs. Sierra Buttes Co., 25 Fed., 343.
Lacey vs. Woodward, 25 Pac., 785.

Forfeiture is not complete until some one else enters with intent to relocate the property.

Ibid.

Little Gunnell Co. vs. Kimber, 1 Mor. Min. Rep., 536.

While a claim is subject to relocation for failure to perform the requisite annual labor, no forfeiture is worked, and the estate of the locator is not divested until there has been a peaceable entry for the purpose of perfecting the relocation. *The right of the original claimant is terminated only by the entry of the new one.*

2 Lindley on Mines, Sec. 646.

Belcher Co. vs. Deferrare, 62 Cal., 160.

Belk vs. Meagher, 104 U. S., 279.

Oscamp vs. Crystal River Mg. Co., 58 Fed., 293.

Hence, the failure to do this work in the absence of a relocation of the ground by the plaintiff, gives him no cause of complaint whatever; and the instruction given to the jury, to the effect that their verdict should be against the defendants "if they believed from the evidence that the defendants had not performed labor or placed improvements upon the Ophir claim of the reasonable value of $100, even though they may find that plaintiff is not entitled to the ground in conflict" (Transcript, page 410) was in palpable opposition to the law, and the plaintiff can not complain because the jury found otherwise.

There is nothing in Thomas vs. Chisholm, cited by plaintiff, to change this view. We showed everything necessary "to entitle us to a patent from the United States," and if we had not introduced a particle of evidence relating to annual labor in 1897, the showing would, nevertheless, have been complete. Plaintiff can take advantage of nothing on this score until he relocates for our remission; and when he relocates he admits the validity of our prior location.

Belk vs. Meagher, 104 U. S., 279.

The federal question here insisted upon, even if it could be raised, does not involve a decision "against any right, title, privilege or immunity specially set up or claimed by the plaintiff." On the contrary, he secured from the trial court his construction of the law and his contention is in effect a tirade upon the jury because it found the facts against him, and therefore did not give him the benefit of his instruction, bad as it was.

We do not think counsel will contend that there is anything jurisdictional in his onslaught against Judge Harris, the jury, the inspection of the premises, the witness Dahl, or the sheriff of the county of El Paso. Passing the matters which he has unsuccessfully pressed upon all inferior courts, and because the record refutes every charge he makes, we may ask whether, from plaintiff's own statement, any federal questions were or have been raised?

He asserts that by his complaint his right of possession is predicated in part upon a compliance with the laws of the United States, and that the defendant has done the same thing. (Brief, pages 240-

242.) We are there referred to R. R. Co. vs. Chicago, in support of the proposition that "Where either party introduced evidence tending to show a compliance with the laws of the United States, he was specially claiming a right under such laws. When the plaintiff asked an instruction bearing upon the question as to what constituted a compliance with the laws of the United States, he was certainly making a claim under such laws. When the plaintiff made an objection to evidence or to an instruction of the court which related to any question as to whether he or the defendants had complied with the laws of the United States, he was asserting a claim under the laws of the United States, and within the general issue as to whether such laws had been complied with." (Brief, page 243.) If this be the law, it is difficult to conceive of a case which could not be brought within the compass of this court's appellate jurisdiction.

Said Mr. Justice Brewer, in Shoshone Co. vs. Rutter, 177 U. S., 505:

> "We pointed out in a former opinion that it *was well settled* that a suit to enforce a right, which takes its origin in the laws of the United States, is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those states come from the United States or by vitrue of its laws. As said by Mr. Chief Justice Waite, in Gold Washing &

> Water Co. vs. Keyes, 96 U. S., 199, 203, 'the suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved * * *.' Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction it must in some form appear upon the record, *by a statement of facts in legal and logical form such as is required in good pleading*, that the suit is one which 'really and substantially involves a dispute or controversy,' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States."

In the Chicago cases cited by counsel in support of his extraordinary proposition, the proceeding was one of condemnation and no answer to the petition in which was permissible. In the defendant's motion to set aside the verdict and for a new trial by the District Court, and afterwards in its assignment of errors in the Illinois Supreme Court, the complaint was expressly made

> "that the several rulings of the court in excluding proper evidence for the defendant, the statute under which proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it were all contrary to the fourteenth amendment," etc.

166 U. S., page 231.

This clearly presented a federal question, not only in the Supreme but in the trial court, and constituted a full compliance with the requirements of Mr. Chief Justice Waite, above quoted. If counsel will place his finger upon a single contention based upon a single line in any pleading, motion or assignment before the trial court, raising or hinting at a federal question, we will then admit the pertinency of the Chicago case to his present contention.

> "The entire question of annual labor," says counsel, "arises upon the laws of the United States. * * * We set up and claimed a right privilege and immunity against this verdict and judgment on the ground that the defendants had not complied with this act of Congress, and this claim was denied." (Brief, page 244.)

The right thus claimed was not in favor of plaintiff at all. He asumed that we had done no work on the Ophir for 1897, and then contended that the jury should have given the claim back to the government. What privilege, right or immunity of the plaintiff is there involved?

We do not quarrel with Bridge Co. vs. Railway Co., 92 U. S., 315. It merely determines that the decision of the court below can be examined here, when properly brought here upon the law and the facts, as far as may be necessary to determine the validity of that right. This seems to be elementary.

But counsel declares

> "that every federal question discussed in his brief was raised in the trial court and again

in the Supreme Court upon its original presentation. These questions were all passed upon either expressly or by some general clause of the original opinion."

Again we ask: What is your federal question, and when was it raised or passed on either generally or specifically? Counsel also says that his "questions were raised in the petition for rehearing, which is sufficient under the decision of this court in Mallett vs. North Carolina, 181 U. S., 589." *They were not raised anywhere.* But, even if counsel were correct in his assertion, his authority is against him. This court there expressly approves its former ruling, that it is too late to raise a federal question on petition for rehearing, wherever the court refuses the petition or dismisses it without passing upon the federal question. In the Mallett case the court below entertained the petition and passed on the federal questions, hence this court took jurisdiction.

Cooke vs. Avery, 147 U. S., 375, is not in point. That case was brought originally in the Circuit Court of the United States. It never was in a state court. It is there decided that when a right or privilege is claimed under a law of the United States, one construction of which will sustain and another defeat such right, the Circuit Court of the United States has jurisdiction, and the plaintiff can not subsequently defeat that jurisdiction by abandoning such contention.

In Des Moines Co. vs. Iowa Co., 123 U. S., 552, held that the prior adjudication *of the same issue* by a federal court was not raised before it, and was there-

fore not in the case. This court held differently and entertained jurisdiction. We are unable to discover the relation of this decision to the case at bar.

We are obliged to counsel for his reference to Oxley Stave Co. vs. Butler Co., 166 U. S., 648. The decision is an elaborate one, and fully sustains our contention that "this court can not review the final judgment of the highest court of a state, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was '*specially set up or claimed*'" in the state court as belonging to such party under the Constitution, or some treaty, statute, commission or authority of the United States. The words "specially set up or claimed" in the statute imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he so declare "specially"—that is, unmistakably—this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. Can any decision be more apposite to the case at bar?

In Green Bay Co. vs. Paper Co., 172 U. S., 58, the court, approving the Oxley case, says that no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court.

It then declares them to be explicitly set up and claimed in the cross-complaint as the foundation of its rights, wherein an act of Congress and the transactions of the canal company with the United States are pleaded and takes jurisdiction. Nothing of this sort appears anywhere in the plaintiff's record. Indeed, we may say with much reason that plaintiff's appeal to this court is due entirely to his defeat in the Supreme Court of the state, and resort to the Supreme Court of the United States was only contemplated after his petition for rehearing was denied. He then seems to have made careful search for something of a jurisdictional nature, and now seeks to torture general expressions of the opinion into specific questions involving the construction of an act of Congress.

We have carefully read the opinion in Sully vs. American National Bank, 178 U. S., 289, cited by counsel, and are obliged to confess that our obtuseness is too great to perceive its relation to the case at bar. Its only applicable feature seems to be that the question of jurisdiction was considered and the salutary doctrine announced that on an appeal from a state court the plaintiff in error must show that he himself raised there the question that he argues here, and it will not aid him to show that some one else had raised it in the state court, while he failed to do so. There seems to be no connection, even remotely, between this proposition and anything revealed by the plaintiff's record.

We now ask the indulgence of the court for a reference to some other decisions which sustain our motion to dismiss. In Telegraph Co. vs. Call Publishing

Co., 181 U. S., 92, it is said that "questions of fact, when once settled in the courts of a state, are not subject to review in this court," thus approving Dower vs. Richards, 151 U. S., 658; Egan vs. Hart, 165 U. S., 188; R. R. Co. vs. Chicago, 166 U. S., 226; Hedrick vs. R. R. Co., 167 U. S., 673, and Gardner vs. Bonestell, 180 U. S., 362. Every proposition discussed *in extenso* by counsel is one of fact, with the exception of what properly defines the term vein or crevice; and these, as we have sought to show, can not be called questions arising under federal laws whereby jurisdiction is conferred.

In Hale vs. Lewis, 181 U. S., 473, the appeal was dismissed, although no motion to that effect was made. This court held that the record disclosed a non-federal ground broad enough to support the judgment, and dismissed the suit, this approving Eustis vs. Bolles, 150 U. S., 531; Beaupre vs. Noyes, 138 U. S., 137; Electric Co. vs. Dow, 166 U. S., 489; Pierce vs. Ry. Co., 171 U. S., 641; Seneca Nation vs. Christy, 162 U. S., 281.

Among the "grounds broad enough to support the judgment" in the case at bar is the one which gives to the first discoverer of a vein the right to it. This proposition we have previously elaborated in our brief in motion to dismiss. (Pages 17-20.) Hence it is unnecessary to do more than refer to it. Another ground broad enough to support the judgment is the fact that the plaintiff's Tecumseh location when made was upon premises withdrawn from exploration by the entry and receiver's receipt for the Ophir then existing and uncanceled.

In Yazoo Co. vs. Adams, 180 U. S., it was held that a writ of error to the Supreme Court of a state can not be sustained when the only question involved is the construction of a charter or contract, although it appears that there were statutes subsequent to such charter which might have been but were not relied upon as raising a federal question concerning the construction of the contract. The court is not bound to search the statutes to find one which can be construed as impairing the obligation of the charter, when no such statute is set up in the pleadings or in the opinion of the court.

In that case the certificate of the chief justice of the state, that on the argument of the case the validity of the later statute was challenged because repugnant to the federal Constitution, was deemed insufficient to supply the omission of the record. Land Co. vs. Laidley, 159 U. S., 103; Turner vs. Commissioners, 173 U. S., 461; Columbia Water Co. vs. Columbia Electric Co., 172 U. S., 475, and McCulloch vs. Virginia, 172 U. S., 102, are approved.

> "If it appear from the record *by clear and necessary intendment that the federal question must have been directly involved*, so that the state court could not have given judgment without deciding it, that will be sufficient; *but resort can not be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question and a decision necessarily rendered thereon*

in arriving at conclusions upon the matters actually presented and considered."

Powell vs. Brunswick County, 150 U. S., 440.

In Capital Dairy Co. vs. Ohio, 183 U. S., 238, it is decided that on error to a state court, this court can not consider an alleged federal question, when it appears that the federal right thus relied upon had not by adequate specification been called to the attention of the state court, and had not been by it considered, *not being necessarily involved in the determination of the case.* In that case the answer contained a general statement that "this proceeding is in violation of the Constitution of the United States." Here the plaintiff in error has not even done that much. This general clause involved no specification which the court could consider, and the judgment was affirmed.

Unless, therefore, the plaintiff can convince the court that in the general mass of discussion and controversy which his record and argument disclose, a finger can be placed upon some specific item of federal construction or federal right, the decision of which was necessarily involved in the determination of the case and adversely to him, the motion to dismiss and affirm must be sustained. The case has been pending for many years. The plaintiff has had a fair trial, and the issues were found against him. He appealed to the Supreme Court, where, after the most elaborate argument, in which all his alleged errors were reviewed, the judgment was affirmed. He then asked for a rehearing, and the Supreme Court of Colorado reviewed itself and affirmed its own judgment

by denying the petition. Then, for the first time, the plaintiff discovered that federal questions were involved in his record.

Whereupon he asked for and obtained a writ of error from this court. He then asked for a supersedeas, which was denied him. He now files a brief of 249 pages, devoted almost entirely to a review of the state court decision, and to indiscriminate abuse of everybody and everything connected with the trial. Not content with assigning error upon every possible phase of the decision (in none of which he attempts to reveal federal questions), he grossly slanders that court by asserting that

> "it erred in holding that the willful use of false testimony, and the manufacturing of fictitious evidence by what is known as the 'salting' of the Ophir shaft was not a ground of reversal of the judgment in said cause."
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> Transcript, pages 488-9.

There is nothing in the record, in the opinion of the Supreme Court of Colorado, that even remotely justifies this frightful accusation. In this court such perversions of privilege should be punished by summary dismissal of the appeal, irrespective of its merits, for it would appear that some such summary punishment is the only means of preventing their constant recurrence. Whatever counsel may urge against the ability of the Supreme Court of his state, we may assure this great tribunal that its integrity is not only above reproach, but that it is wholly in-

capable of justifying the use of false testimony for any purpose; and because it declined to substitute the wild declamations of counsel for the recitals of the record, it should not be indicted on the records of this court for a crime it did not and could not commit. The desperate and hopeless character of plaintiff's appeal to the jurisdiction of this court may explain, but it can not excuse, either this charge or the so-called argument that is based upon it. For the reasons herein presented, and those in the argument supporting our motion to dismiss the suit, we ask the court to refuse consideration of the case, and to affirm the judgment of the Supreme Court of Colorado.

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